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In the
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE of WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington Court of Appeals, Division III

BRIEF OF ALABAMA, DELAWARE, FLORIDA, HAWAII, ILLINOIS, NEBRASKA, OREGON, TEXAS, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(Restated)

1. Under the Sixth Amendment, may a state legislature set the maximum sentence for a crime, set a standard sentence for the crime, and then assign the trial court the responsibility to determine whether there are special circumstances that warrant upward departure from the standard sentence to an exceptional sentence that still does not exceed the maximum?

2. Should a federal court defer to a state court's determination whether a state legislature intended to designate a particular factual finding an "element" of the crime, which must be found by the jury, or a "sentencing factor," which may be found by the judge, under the Sixth Amendment?

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INTEREST OF AMICI CURIAE

The States of Alabama, Delaware, Florida, Hawaii, Illinois, Nebraska, Oregon, Texas, Utah, and Virginia submit this brief as amici curiae under Supreme Court Rule 37.4, in support of the respondent State of Washington. At issue in this case is whether Washington's sentencing guidelines comply with the Sixth Amendment, as explicated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Numerous States have adopted structured sentencing schemes similar to Washington's. At the initiative of Attorney General Pryor, an Alabama commission has developed a set of standardized sentencing guidelines, which it intends to submit to the Alabama legislature at the beginning of the next legislative session.

These various guidelines all seek to eliminate both actual and perceived disparities in criminal sentencing by making it more regular and more transparent. Amici share an interest in seeing that *Apprendi* is not interpreted so inflexibly as to frustrate achievement of these goals. Amici also share an interest in seeing that *Apprendi* is not reduced to a formalistic trap for legislatures whose penological aims are constitutionally licit but whose draftsmanship does not happen to fit a particular statutory form.

As long as a State does not attempt a blatant end-run around *Apprendi* — e.g., by re-characterizing traditional elements as sentencing factors and prescribing a wide range of sentences for the trial court to choose from — the federal courts should defer to a state court's determination of what constitutes an "element" and what constitutes a "sentencing factor" for a particular crime. Otherwise *Apprendi* could spell the demise of many state sentencing regimes, including

standardized guidelines like Washington's. It would also adversely affect capital sentencing statutes, like Alabama's, that provide for additional findings before imposing a death sentence. None of these regimes evinces any nefarious legislative intent to siphon traditional Sixth Amendment fact-finding responsibility away from the jury. They are part of a long tradition in this country of dividing sentencing responsibility between the jury and judge, which *Apprendi* acknowledged and purported not to disturb. Amici therefore urge this Court to affirm the ruling of the Washington Court of Appeals and not to extend the rule of *Apprendi* any further.

STATEMENT OF THE CASE

Petitioner Ralph Howard Blakely, Jr. pleaded guilty in Washington state court to second-degree kidnapping and second-degree assault. Under Washington law, both crimes are Class B felonies. By statute, a Class B felony carries a maximum sentence of ten years (120 months) imprisonment and a maximum fine of $20,000. Under Washington's sentencing guidelines, Blakely faced a standard sentence of 49-53 months for the kidnapping charge and a standard sentence of 12-14 months for the assault charge.

The trial court found two circumstances, however, that in its view warranted an upward departure from the standard sentence. First, in committing the offense, Blakely manifested deliberate cruelty by confining his wife in a coffin-like box. Second, he threatened his wife in the presence of their thirteen-year-old son, manifesting deliberate cruelty toward or intimidation of a minor child in a domestic violence situation. Accordingly, as authorized by the guidelines,

the trial court imposed an "exceptional sentence" of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. Although the 90-month sentence imposed is well below the legislatively-authorized 120-month maximum for a Class B felony, Blakely contends that his "exceptional sentence" violates the Sixth Amendment.

A. Washington's sentencing guidelines

Washington's criminal sentencing process is governed by its Sentencing Reform Act (SRA).[1] Like many state sentencing guidelines[2] — and indeed like the U.S. sentencing guidelines — the SRA prescribes a standardized system by which judges determine a sentence within a range set by statute. The SRA was designed to "make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate" judicial sentencing discretion.[3] Washington enacted the SRA in 1981, long before this Court's decision in *Apprendi v. New Jersey*[4] clarified the constitutional significance of designating a maximum sentence for a particular crime.

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[1] Wash. Rev. Code § 9.94A.

[2] *See, e.g.*, Ark. Code Ann. § 16-90-804; Fla. Stat. ch. 921.0016; Mich. Comp. Laws Ann. § 769.34; Minn. Stat. Ann § 244.10; N.C. Gen. Stat. § 15A-1340.16(b); *State v. Dilts*, 2003 WL 22966264, at *2 (Or. Dec. 18, 2003) ("Under [Oregon's] guidelines, a sentencing judge may impose a sentence that is an upward or downward departure from the presumptive sentence for a crime on finding 'substantial and compelling reasons' that justify imposing such a departure."), *citing* Or. Admin. R. 213-008-0001.

[3] Wash. Rev. Code § 9.94A.010.

[4] 530 U.S. 466 (2000).

Washington Revised Code Section 9A.20.021 establishes the maximum sentences for each type of crime:

> (1) Felony. Unless a different maximum sentence is specifically established by statute, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:
>
> (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;
>
> (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;
>
> (c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine;
>
> (2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A [of the Washington Revised Code] shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

> (3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A [of the Washington Revised Code] shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

The guidelines of the SRA operate to determine the convict's sentence *within these ranges.* Under no circumstances may a trial court impose a sentence in excess of the maximum set out in section 9A.20.021.

The SRA structures the discretion of the trial judge by prescribing a two-stage process for determining a convict's sentence. During the first stage, the trial court determines the standard sentencing range for the convict. The standard range is a function of two variables: the offense- seriousness level and the offender score.[5] "The offense seriousness level is determined by the offense of conviction."[6] The offender score is determined primarily by the convict's past criminal history.[7]

During the second stage, the trial court determines whether it has a "substantial and compelling" reason to depart upward or downward from the standard range and impose an "exceptional sentence." The SRA provides a list of "aggravating" circumstances" that will

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[5] Wash. Rev. Code §§ 9.94A.515, 9.94A.525.

[6] Wash. Rev. Code § 9.94A.520. Table 2 of the SRA, codified at Wash. Rev. Code § 9.94A.515, designates the seriousness level for every crime in Washington, ranging from I (least serious) to XVI (most serious).

[7] Wash. Rev. Code § 9.94A.525.

justify an upward departure[8] and a list of "mitigating circumstances" that will justify a downward departure.[9] The SRA makes clear that these lists are "illustrative only and ... not intended to be exclusive reasons for an exceptional sentence."[10] The "court is allowed to impose a sentence outside the standard range, either higher or lower, as long as it finds 'considering the purpose of [the SRA] that there are substantial and compelling reasons justifying an exceptional sentence.'"[11] The only limitation on the court's discretion — excluding, of course, an inability to sentence above the statutory maximum — is that the "substantial and compelling" reason may not duplicate an element of the crime."[12]

Both upward and downward departures are subject to appeal: the former by the defendant and the latter by the State.[13] "To reverse a sentence outside the sentence range, the reviewing court must find (a) [e]ither that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."[14]

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[8] Wash. Rev. Code § 9.94A.535(2).

[9] Wash. Rev. Code § 9.94A.535(1).

[10] Wash. Rev. Code § 9.94A.535.

[11] *State v. Ammons*, 713 P.2d 719, 723 (Wash. 1986) (citing former Wash. Rev. Code § 9.94A.120(2)).

[12] *State v. Grewe*, 813 P.2d 1238, 1240 (Wash. 1991).

[13] *State v. Sanchez*, 848 P.2d 208, 209 (Wash. App. 1993); Wash Rev. Code § 9.94A.210(4).

[14] *Sanchez*, 848 P.2d at 210.

B. Blakely's conviction and sentence

In July 1995, petitioner Ralph Howard Blakely, Jr. broke into the Spokane, Washington home of his estranged wife, Yolanda, and threatened to poison her and their children or to kidnap them. Yolanda filed for divorce. Sometime thereafter, Blakely built a coffin-like box at his home in Montana, big enough to fit his wife.

On October 26, 1998, Blakely put the coffin on the back of his truck and drove to his wife's farm in Washington. Outside at the mailbox, he grabbed Yolanda, threatened to kill her with the knives and guns in his possession, and forced her to crawl into the box. He then drove up to the house and loaded his wife's financial files and computer into the back of the truck.

While Blakely was still at the home, his thirteen-year-old son Ralphy arrived from school. Blakely threatened his son with a filet knife and ordered Ralphy to follow the truck in his mother's car. He threatened to shoot Yolanda with a shotgun if Ralphy did not obey him. Later, when they stopped for gas, Ralphy escaped, but Blakely drove off with Yolanda still trapped in the coffin. Blakely drove all night and into the next day toward his home in Montana. From time to time, he would release Yolanda from the coffin and allow her to sit in the cab with her hands tied, while he kept a knife by the steering wheel.

On October 27, 1998, the day after he had kidnapped his wife and put her in the coffin, Blakely reached the home of one of his neighbors in Montana. He imprisoned her, too, but she managed to escape and go to the police. Federal agents apprehended Blakely later that same day.

Blakely was initially charged in state court with two counts of first-degree kidnapping: one for his wife and the other for his son. Under Washington statute, first-degree kidnapping is a Class A felony.[15] As noted, the maximum sentence for a Class A felony is life in prison.[16]

Following jury selection, Blakely agreed to plead guilty to the second-degree kidnapping of his wife, enhanced by his use of a deadly weapon, and to the second-degree assault of his son.[17] Both crimes are Class B felonies under Washington statute and thus carry maximum sentences of ten years (120 months).[18] Under the guidelines, second-degree kidnapping has a seriousness level of V and second-degree assault has a seriousness level of IV.[19] Taking into account Blakely's offender score, the standard sentencing range for the kidnapping offense was 13-17 months.[20] The enhancement for use of a deadly weapon raised the standard range for the kidnapping charge by 36 months.[21] On the kidnapping count, therefore, Blakely faced a standard range of 49-53 months, with a maximum of 120 months. On the assault charge, he faced a standard range of 12-14 months, also with a maximum of 120 months.

The State amended the charging information to reflect the negotiated charges and informed Blakely that the maximum prison term he could receive for each crime was ten years.[22] In the plea agreement, the

[15] Wash. Rev. Code § 9A.40.020(2).
[16] Wash. Rev. Code § 9A.20.021(1)(a).
[17] *State v. Blakely*, 47 P.3d 149, 151 (Wash. App. 2002).
[18] Wash. Rev. Code § 9A.20.021(1)(b).
[19] Wash. Rev. Code § 9.94A.515.
[20] J.A. 63.
[21] J.A. 63.
[22] J.A. 76.

State recommended that Blakely receive concurrent sentences at the high end of the standard sentencing range for his crimes: i.e., 53 months.[23] The plea agreement made clear, however, that the trial court did not have to accept the State's sentencing recommendation and could depart upward from the standard range for each conviction.[24]

The trial court accepted Blakely's plea of guilty. The court found, however, two "substantial and compelling reasons" that in its view warranted upward departure from the standard range for second-degree kidnapping: "(1) [that] Mr. Blakely's conduct during the kidnapping manifested deliberate cruelty to his wife, former RCW 9.94A.390(2)(a) (1997); and (2) [that] the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child, former RCW 9.94A.390(2)(h)(ii), (iii) (1997)."[25] Accordingly, the trial court "imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge"[26] — a sentence well below the 120-month maximum presented by statute.

Blakely contested the court's decision to depart upward. As required,[27] the court then held an evidentiary hearing, at which testimony was presented from the victims and mental health professionals. After the hearing, the court announced that it would not change Blakely's sentence.

On appeal, Blakely argued that the upward departure from the standard sentencing range violated

[23] *Blakely*, 47 P.3d at 154.
[24] J.A. 66.
[25] *Blakely*, 47 P.3d at 157.
[26] *Id* .at 154.
[27] Wash. Rev. Code § 9.94A.530(2).

Apprendi v. New Jersey.[28] Following the Washington Supreme Court's decision in *State v. Gore*,[29] the intermediate court of appeals rejected Blakely's claim. The court reasoned that the "substantial and compelling" reasons found by the trial court "neither increase[d] the maximum sentence nor define[d] separate offenses calling for separate penalties."[30] The court of appeals also reviewed the reasons given by the trial court and found that they afforded adequate justification for upward departure from the standard sentencing range. The court of appeals accordingly affirmed Blakely's conviction and sentence.

The Washington Supreme Court denied review.[31] This Court then granted certiorari to address the *Apprendi* issue raised by Blakely.

SUMMARY OF ARGUMENT

Blakely's sentence of 90 months for second-degree kidnapping did not exceed the statutory maximum of 120 months. Indeed, no matter how "substantial or compelling" its reasons, the trial court could never have sentenced Blakely to more than 120 months as a matter of Washington law. Under *Apprendi*, as long as the sentence that the trial court imposes does not exceed the statutory maximum for the crime, the sentence is valid. The trial court should be entitled to make any factual findings, whether mandated by statute or taken at the court's own initiative, in determining that sentence.

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[28] J.A. 15.
[29] 21 P.3d 262 (Wash. 2001).
[30] J.A. 19.
[31] J.A. 60.

Blakely's contention to the contrary boils down to the faulty proposition that any mandated factual finding — any factual finding that is a prerequisite to the final sentence — is automatically an element of the crime and must be found by the jury. Not only does this interpretation lack any basis in the text, history, or logic of the Fifth and Sixth Amendments, it raises a host of practical problems, not the least of which is that it would invalidate the sentencing guidelines of several States and the federal government, as well as the capital sentencing regimes of several other States. For all these reasons, Blakely's sentence — and the Washington sentencing guidelines — should be upheld.

ARGUMENT

The rule of *Apprendi* is that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be ... submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476. Blakely does not dispute that the judge in this case did not exceed the statutory maximum for second-degree kidnapping of 120 months. Indeed, he does not dispute that the judge could never have exceeded the statutory maximum, no matter what "substantial and compelling reasons" the judge might have found, because Washington's guidelines do not permit it. Under *Apprendi*, these realities ought to dispose of any constitutional objections.

Nevertheless, Blakely contends that the trial judge violated *Apprendi* by departing upward from the standard sentencing range of 49-53 months to the "exceptional sentence" of 90 months for the crime of second-degree kidnapping. His argument appears to be that, because the judge was not entitled to depart upward without first finding a statutory aggravating

circumstance or some other "substantial and compelling" reason, the judge effectively increased the maximum penalty for the crime. In other words, for purposes of *Apprendi*, the maximum sentence was not 120 months — the maximum that the Washington legislature prescribed in Section 9A.20.021 — but rather 53 months — the upper end of the standard range determined from the seriousness level of Blakely's crime and from Blakely's offender score.

Under this interpretation of *Apprendi*, the "maximum penalty" for a crime — and thus the definition of the elements of a crime — is no longer a matter of legislative intent. If state law mandates any finding of fact before imposition of a given sentence, that finding is deemed to change the "maximum penalty" and thereby becomes an "element" of the crime, even if the sentence does not and cannot exceed the statutory maximum designated by the legislature. All mandatory factual findings would have to be made by a jury. There would no longer be any such thing as a mandatory "sentencing factor" to be considered by a judge.

There are at least three problems with this interpretation of *Apprendi*. First, it displaces legislative prerogative — worse yet, state legislative prerogative — to define the elements of a crime. Second, it pretermits the development of structured sentencing processes that blend the relative aptitudes of judge and jury thereby enhancing accuracy, regularity, and transparency in criminal sentencing. Third, Blakely's misguided interpretation requires even "soft" findings (the existence of a "substantial and compelling" reason for a higher sentence) to be treated as elements of a crime, which is illogical and will wreak

havoc on the indictment process. For all these reasons, Blakely's interpretation of *Apprendi* should be rejected.

I. The Sixth Amendment Requires the Jury to Find Only Those Facts That the Legislature Has Deemed Essential to Establish the Maximum Penalty for the Crime.

"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[32] As charged by the dissenters in *Apprendi*[33] and acknowledged by the majority as well,[34] this rule is prone to manipulation, especially when the statute is unclear as to the "prescribed range of penalties" and what set of facts triggers exposure to them. The statute in this case, however, is not unclear. Washington Revised Code Section 9A.20.021 states in no uncertain terms that the maximum punishment for a Class B felony is "confinement in a state correctional institution for a term of ten years," "a fine in an amount fixed by the court of twenty thousand dollars," or both. Both crimes to which Blakely pleaded guilty are Class B felonies. Washington statutes define the elements of both crimes. By pleading guilty to these crimes, Blakely waived his right to jury disposition of all the factual issues that the Washington legislature deemed essential to establishing 120 months and $20,000 as his maximum penalties.

Blakely's interpretation violates this clear legislative intent. It would treat any finding of fact that is a prerequisite to the final sentence — regardless of how the legislature intended to treat that finding —

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[32] *Apprendi*, 530 U.S. at 490.
[33] *Id.* at 540-43.
[34] *Id.* at 490 n. 16.

as an element of the crime in question. This interpretation of *Apprendi* may relieve a court of the sometimes vexing interpretive task of distinguishing between "elements" and "sentencing factors,"[35] but it does so at the intolerable expense of usurping legislative prerogative to define the elements.[36] Furthermore, when the statute defining the elements of the crime has been promulgated by a State, the courts of that State should have the prerogative to interpret legislative intent. Unless there is evidence that the State is attempting to evade the dictates of the Sixth Amendment by redefining elements as sentencing factors, federal courts should defer to a state courts' determinations whether a given factual finding is a sentencing factor or an element.

Here, long before *Apprendi* (and thus long before it could have been aware of the consequences of its decision for the issue in this case), the Washington legislature declared in no uncertain terms that the maximum sentences for second-degree kidnapping and second-degree assault would be ten years. As a matter of Washington law, none of the guidelines that the trial court followed in determining Blakely's exact sentence could have altered this statutory maximum. Washington courts have accordingly interpreted the factual findings made by the judge in the course of following the guidelines to be sentencing factors only, even though the findings are mandatory. Absent evidence of constitutional gamesmanship on the part of the State, a state court's interpretation of state law should be entitled to deference.

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[35] *Harris v. United States*, 536 U.S. 545, 550 (2002).

[36] *Id.* at 550 ("The Constitution permits legislatures to make the distinction between elements and sentencing factors").

II. Requiring the Jury To Make All Factual Findings That Are a Prerequisite to Final Sentence — Even When Those Findings Cannot Possibly Increase the Maximum Penalty — Eliminates Many of the Advantages Afforded by Structured Sentencing.

Blakely's interpretation of *Apprendi* would permit a legislature to employ structured sentencing only if it committed the structured decisional process to a jury. It would forbid the legislature curtailing, in any way, the sentencing discretion of a trial court. In essence, it would force a legislature to choose one of three sentencing processes. First, the legislature could eliminate sentencing discretion altogether by assigning a fixed sentence for each crime, as was common in the late eighteenth century.[37] Second, the legislature could set a range of punishment for each crime and leave the exact sentence to the unbridled discretion of the trial court, as became common in the nineteenth century.[38] Third, the legislature could enact sentencing guidelines, like Washington's SRA, and have a jury make all the mandated findings. What it could *not* do is have a judge apply the guidelines.

Legislatures have historically delegated sentencing authority to both judges and juries, in an attempt to

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[37] *Apprendi*, 530 U.S. at 479 ("[W]ith respect to the criminal law of felonious conduct, the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it proscribed a particular sentence for each offense.") (citation omitted).

[38] *Id.* at 481 (affirming the Court's previous "recognition of judges' broad discretion in sentencing – since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range ....").

exploit the relative advantages of both. Judges enhance rationality through their legal training, professional discipline, and institutional knowledge. Juries protect liberty by preventing consolidation of decision-making power in a single person and by supplying a cross-section of the conscience of the community. A legislature thus may wish to delegate certain sentencing decisions to the judge and others to the jury, and there is no clear reason why the Fifth and Sixth Amendments should impede this thoughtful division of responsibility. *Apprendi* requires juries to set the upper limit of a convict's sentence, so as to prevent erosion of the essential liberty in the Fifth and Sixth Amendments, but it should not prevent legislatures from designing sentencing processes that blend the aptitudes of judge and jury.

In this case, for instance, the Washington legislature may understandably prefer to have the trial judge make the finding of a "substantial and compelling" reason for upward departure, because the trial judge will be constrained by memory of past cases and by the repeated discipline of appellate review. Blakely's interpretation of *Apprendi* would prevent the Washington legislature from choosing this option. If the Washington legislature still wished to provide for upward departure and did not want to entrust this decision to a jury, it would have to widen the standard sentencing range that results from tabulation of the offense seriousness level and the offender score (perhaps from 49-53 months to 49-120 months) and then leave it to the unfettered discretion of the trial court to impose a sentence anywhere within the significantly wider range. This approach would all but eliminate the transparency and regularity that the legislature sought to gain by prescribing guidelines in the first place.

The bottom line is that Blakely's interpretation of *Apprendi* would cut a wide swath through the various blended sentencing regimes that state legislatures have developed over the years. Several States — e.g., Michigan, [39] Minnesota, [40] North Carolina, [41] and

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[39] The Michigan guidelines provide that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines ... if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Mich. Comp. Laws Ann. § 769.34(3). Rather than providing a non-exhaustive list of "aggravating" factors like Washington, however, the Michigan guidelines set forth a number of factors that may not be considered for such a purpose. Mich. Comp. Laws Ann. § 769.34(3)(a),(b) .

[40] Under Minnesota's guidelines, "in each case in which the court imposes or stays a sentence that deviates from the sentencing guidelines," the "court shall make written findings of fact as to the reasons for departure ...." Minn. Stat. Ann § 244.10, subd. 2. Any departure must be supported by "substantial compelling reasons." *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). Like that of Washington, "[t]he commission [in Minnesota] has produced a nonexclusive list of appropriate aggravating and mitigating factors to assist a trial court considering departure in its analysis." *Id.*

[41] In North Carolina, the trial court "may depart from the presumptive range" if it "finds that aggravating or mitigating factors exist." N.C. Gen. Stat. § 15A-1340.16(b). "The court shall make [written] findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range ...." N.C. Gen. Stat. 15A-1340.16(c). The statute provides a list of "aggravating factors," but also allows the judge to find "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20).

Oregon [42] — have sentencing regimes that are functionally identical to Washington's. They would almost certainly be invalidated under Blakely's interpretation of *Apprendi*. Two States — Arkansas[43] and Florida[44] — permit upward departure but do not require a stated reason unless the departure exceeds a certain percentage of the "standard" sentence.

The Arkansas and Florida guidelines emphasize the irrational effect of the rule proposed by Blakely. In

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[42] "Under [Oregon's] guidelines, a sentencing judge may impose a sentence that is an upward or downward departure from the presumptive sentence for a crime on finding 'substantial and compelling reasons' that justify imposing such a departure." *State v. Dilts*, 2003 WL 22966264, at *2 (Or. Dec. 18, 2003), *citing* Or. Admin. R. 213-008-0001. "The rules provide a list of aggravating and mitigating factors that a sentencing judge may consider in determining whether substantial and compelling reasons exist to impose a departure sentence." *Dilts*, at *2, *citing* Or. Admin. R. 213-008-0002.

[43] In Arkansas, "the trial court may deviate within a five percent (5%) range below or above the presumptive sentence without providing a written justification." Ark. Code Ann. § 16-90-804(a)(1). If the trial court departs more than the designated 5%, however, he or she must provide "written justification." Ark. Code Ann. § 16-90-804(a)(2)(A). Like the system at issue here, moreover, the Arkansas guidelines provide "a nonexclusive list of factors which may be used as reasons for departure ...." Ark. Code Ann § 16-90-804(d).

[44] Under Florida's system, "[a] trial court judge may impose a state prison sentence which varies upward or downward by up to, and including, 25 percent from the recommended guidelines state prison sentence without issuing a written statement delineating the reasons for the variation." Fla. Stat. ch. 921.0016(1)(b). A "sentence which varies upward or downward from the recommended guidelines ... by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure ...." Fla. Stat. ch. 921.0016(1)(c). Like Washington, the Florida guidelines include a non-exhaustive list of "[a]ggravating circumstances under which a departure ... is reasonably justified." Fla. Stat. Ch 921.0016(3).

both States, the trial court may depart from the "recommended" or "presumptive" range up to a set percentage without offering any justification for the departure. In other words, it may do so for numerous unstated reasons or for no articulable reason at all. This is perfectly permissible under Blakely's interpretation of *Apprendi*. Once the guidelines require the court to provide justification, however (i.e., on an upward departure of more than 5% in Arkansas and more than 25% in Florida) they violate the Sixth Amendment. Thus, perversely, the Sixth Amendment is violated by a requirement that provides substantially more protection to a defendant.

III. It Makes No Sense To Treat Even Soft Findings — Such as Whether There Is a "Substantial and Compelling" Reason To Depart Upward From the Standard Sentence — as Elements of the Crime That Must Be Found by the Jury.

Finally, Blakely's interpretation of *Apprendi* would treat as "elements" of the crime certain soft findings that are not truly findings of fact but instead reflect the application of law and judgment to a field of facts. This sort of finding — such as whether there is a "substantial and compelling" reason to depart upward from the standard sentence — is not aptly characterized as "the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [45] It is more like a judgment — a legal conclusion that requires consideration of a wide array of facts and is not reducible to a formula or to the

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[45] *Apprendi*, 530 U.S. at 483.

discovery of a discrete datum. It is the declaration of the legal significance of fact, not the finding of fact itself. It does not comfortably fit within the rule of *Apprendi*.

In capital cases, a great number of States, including Washington and Alabama,[46] require the sentencer to weigh aggravating and mitigating circumstances to determine whether the defendant deserves the death penalty. Under Blakely's interpretation of *Apprendi*, the question whether the aggravating circumstances outweigh the mitigating circumstances would become an element of the crime of capital murder and would have to be proved to a jury beyond a reasonable doubt. But that makes no sense:

> While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative weight is not. The process of weighing circumstances is a

[46] Alabama (Ala. Code § 13A-5-46); Arkansas (Ark. Code Ann. § 5-4-603 (Repl. 1997)); California (Cal. Penal Code § 190.3 (West 1999)); Connecticut (Conn. Gen. Stat. § 53a-46a (2001)); Kansas (Kan. Stat. § 21-4624 (1995)); Maryland (2002 Md. Laws 26); Mississippi (Miss. Code Ann. § 99-19-101 (1999)); Missouri (Mo. Rev. Stat. § 565.030, 565.032, 565.035 (West 1999)); Nevada (Nev. Rev. Stat. 175.552, 175.554, 175.556 (1995)); New Hampshire (N.H. Rev. Stat. Ann. § 630:5 (1996)); New Jersey (N.J. Stat. Ann. § 2C:11-3 (West 1995)); New Mexico (N.M. Stat. Ann. § 31-20A-2 (1978)); New York (N.Y. Crim. Pro. Laws § 400.27(11)(a) (McKinney 1995)); North Carolina (N.C. Gen. Stat. § 15A-2000(b) (1995)); Ohio (Ohio Rev. Code Ann. § 2929.03(D)(2) (West 1996)); Oklahoma (Okla. Stat. Ann. Tit. 21 § 701.11 (West 1983)); Pennsylvania (42 Pa. Consol. Stat. § 9711(c)(1) (West 1998)); Tennessee (Tenn. Code Ann. § 39-13-204(g)(1) (1989)); Utah (Utah Code Ann. § 76-3-207(b) (1953)); and Washington (Wash. Rev. Code Ann. § 10.95.060(3) (2002), *see also State v. Brown*, 940 P.2d 546 (Wash. 1997).

> matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.[47]

This is particularly true given this Court's holding that the sentencer must be permitted to consider every possible piece of mitigating evidence during the process of weighing.[48] Indeed, this Court held that the sentencer must be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty."[49] A finding that requires the exercise of "unbridled discretion" cannot logically be considered an element of the crime under the Fifth and Sixth Amendments.

To treat these soft findings as elements of the crime would also be impractical. It would turn federal indictments, at least,[50] into lengthy, almost limitless disquisitions on the various prejudicial details of the crime. Had this case been federal, for instance, the government would, in Blakely's view, have been required to detail Blakely's use of the coffin-like box to transport his wife from Washington to Montana, his threats against her in the presence of his son, and any other circumstance that might be relevant to the sentencing jury's later determination whether there is "substantial and compelling" reason to depart upward

[47] *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (internal citations omitted); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983).

[48] *Lockett v. Ohio*, 438 U.S. 586, 606 (1978); *accord Zant v. Stephens*, 462 U.S. 862, 878-79 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982).

[49] *Zant v. Stephens*, 462 U.S. at 875.

[50] The Fifth Amendment Grand Jury Clause has not been incorporated into the Fourteenth Amendment Due Process Clause. *Hurtado v. California*, 110 U.S. 516 (1884); *Beck v. Washington*, 369 U.S. 541, 545 (1962).

from the standard sentencing range for the crime. Like the rest of Blakely's arguments, it is far from clear that such a requirement would inure to the benefit of criminal defendants.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Washington Court of Appeals.

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